IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.M.JAMES

TUESDAY, THE 27TH FEBRUARY 2007 / 8TH PHALGUNA 1928

CRL.A.No. 1544 of 2003()

CC.806/2001 of JUDL. MAGISTRATE OF FIRST CLASS-II, SULTHANBATHERY

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APPELLANT: COMPLAINANT:

ALEX ALIAS ALEX JOSEPH,
S/O. JOSEPH PANNILATH (H), PADICHIRA AMSOM,DESOM,
PULPALLY, S. BATHERY TALUK.

BY ADV. SRI.PHILIP MATHEW

RESPONDENTS: ACCUSED & STATE:

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1. K.V.SABU, S/O. ULAHANNAN,
KULAKKATTIL (H), CHELOOR, PADICHIRA AMSOM,
S. BATHERY.

2. STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY ADV. SRI.SUNNY MATHEW
BY PUBLIC PROSECUTOR SRI.PUZHAKKARA MUHAMMED.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 27/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.M. JAMES, J.

Criminal Appeal No.1544 of 2003

Dated this the 27th February, 2007.

J U D G M E N T

The complaint preferred by the complainant under Section 138 of the Negotiable Instruments Act, was dismissed by the Judicial First Class Magistrate Court-II, Sulthan Bathery, after considering the evidence consisting of one witness for the first respondent, accused, on the ground that Ext.P1 cheque was issued as a security and not to discharge any debt due to the holder of the cheque in due course, the complainant, the appellant.

2. When the matter came up for consideration, the learned counsel appearing for the appellant, complainant, placed reliance on **I.C.D.S. Ltd. v. Beena Shabeer** *(2002 (3) KLT 218(SC))*, and **General Auto Sales v. Vijayalakshmi** *(2005 (1) KLT 478)*, which followed the Beena Shabeer's case, and argued that even if the cheque is issued as a security, it comes within the 'other liability', as contemplated under Section 138 of the Negotiable Instruments Act, in short 'the Act', and, therefore, the offence under Section 138 of the Act is attracted.

3. I heard the arguments advanced by the learned counsel, Mr.Abilash, appearing for the appellant, and the learned counsel, Mr.Sunny Mathew, appearing for the first respondent, accused. In the facts and circumstances of the case, there is no reason not to apply the views taken in Beena Shabeer's case, cited above, by the Apex Court. Ext.P1 cheque has been issued as a security, at the time of the drawing of the amount. Therefore, I agree with the arguments advanced by the learned counsel that it comes under 'other liability', as contemplated under Section 138 of the Act. Therefore, that finding is set aside.

4. The learned counsel, Mr.Sunny Mathew, appearing for the first respondent, accused, submitted relying on the evidence of DW.1, that Ext.P1 cheque was not issued to the complainant, appellant, and it was issued to one Shaji.

5. I have gone through the evidence of DW.1. He speaks in favour of the transaction between Shaji, as well as the accused. He deposed that he had written the number of Ext.P1 cheque, in his diary. What prompted him to write down the cheque number is not explained. In the cross examination, he stated that he

is not aware of many facts which he ought to have known. Therefore, it is clear that this witness is deposing favouring the first respondent, accused. Therefore, I cannot accept the evidence of DW.1. To rebut the presumption, the first respondent, accused, did not adduce any evidence, examining any other independent witness. In such circumstances, I find that no other discussion is necessary, and in the light of Sections 118 and 139 of the Act, I presume that Ext.P1 cheque had been issued in the name of the appellant. There is no explanation even from DW.1, why Ext.P1 cheque was issued in the name of DW.1.

6. The learned counsel for the first respondent, accused, submitted, relying on Section 313 Cr.P.C. statement, that Ext.P1 was not given to the appellant. Except this statement and the interested testimony of DW.1, there is no material available on record to show that Ext.P1 cheque was not issued as deposed by DW.1. Therefore, I find that materials available on record and evidence adduced are sufficient to establish that Ext.P1 cheque was issued in discharge of a legal debt, due to the appellant. Hence, I set aside the impugned judgment, I hold that the first respondent, accused, is guilty of the offence punishable under Section 138 of the Act, and convict him thereunder.

7. Before sentencing, the accused will have to be heard on the question of sentence. For that limited purpose alone, I remit C.C.No.806/2001, to the file of the Judicial First Class Magistrate Court-II, Sulthan Bathery.

8. The parties shall appear before the court below on 22.3.2007.

9. The learned Magistrate shall dispose of the case, as per the law, within one month from the date of appearance of the parties.

Criminal Appeal is allowed as above.

J.M. JAMES,
JUDGE

nj.